1996

Christina R. Stokes v. Mary J. Pulley, Wendall Hansen, Camille Fowler, Jim Fowler, Travis Hansen, Troy Hansen and Regan Hansen : Petition for Rehearing

Utah Court of Appeals

T. McKay Stirland; Donald E. McCandless; Fisher, Scribner & Stirland; Attorneys for Appellees.
Todd Utzinger; Hakeem Ishola; Ishola, Utzinger & Perretta; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

CHRISTINA R. STOKES, Plaintiff and Appellant, vs. MARY J. PULLEY, WENDALL HANSEN, CAMILLE FOWLER, JIM FOWLER, TRAVIS HANSEN, TROY HANSEN and REGAN HANSEN, Defendants and Appellees.	)	Case No. 960692-CA

PETITION FOR REHEARING

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OPINION FOR WHICH REHEARING IS SOUGHT

Appellant seeks rehearing on this Court's opinion in Stokes v. Pulley, et al., Case No. 960692-CA (Utah App. June 25, 1998), a copy of which is attached hereto as addendum A.

STATEMENT OF THE ISSUE PRESENTED

Did the Court hold appellant to too high a standard when it found her claim that there was a presumption against finding a boundary by acquiescence among family members had not been preserved for appeal because prior counsel indicated that issue was only "implicitly raised" even though the record shows appellant focused her closing argument at trial on showing that no boundary by acquiescence could have been created by members of appellees' family?

INTRODUCTION AND

SUMMARY OF ARGUMENT

A petition for rehearing is proper where the Court has overlooked or misapprehended relevant facts or authority, or misapplied a principle of law. Cummins v. Nielson, 42 Utah 157, 172-73, 129 P. 619, 624 (1913). The argument portion of this petition will demonstrate that the Court misapplied the doctrine of waiver by refusing to consider appellant's claim that there is a presumption against finding a boundary by acquiescence among family members and that the presumption was not overcome in this case. Appellant raised the issue of whether boundary by acquiescence could be established among members of appellees' family, and the trial court's finding of boundary by acquiescence during year a 33 year period — only twelve of which involved a finding of acquiescence by parties outside the appellees' family — reflects a rejection of appellant's argument. This Court should therefore grant rehearing and address the merits of appellant's claim.

ARGUMENT

POINT I

APPELLANT CHALLENGED BOUNDARY BY ACQUIESCENCE AMONG APPELLEES' FAMILY MEMBERS, AND THE TRIAL COURT RULED THAT A BOUNDARY BY ACQUIESCENCE HAD BEEN ESTABLISHED BEFORE APPELLANT PURCHASED HER PROPERTY. THIS ISSUE WAS THEREFORE PRESERVED FOR APPEAL AND SHOULD NOT HAVE BEEN DEEMED WAIVED.

In the proceedings below, appellant produced a legal deed that all parties agreed indicated her parcel of property extended past a fence and line of trees that were on her property (R. 546). At that juncture, the burden shifted to appellees to establish that the

fence/tree line had become a boundary by acquiescence among property owners on both sides of the boundary for a period of at least twenty years (R. 546).[1] In response to the evidence and arguments advanced by appellees to establish a boundary by acquiescence, appellant squarely attacked reliance on that doctrine during times where only members of appellees' family claimed ownership of the property on both sides of the alleged boundary. In so doing, appellant preserved her challenge to boundary by acquiescence among family members.

In holding that appellant failed to preserve the issue of whether family relationships create a presumption of nonacquiescence in an artificial boundary, this Court relied on prior counsel's use of the phrase "implicitly [raised]" to deem the issue waived on the ground that the claim was not "expressly preserved" for appellate review. Stokes v. Pulley, et al., Case No. 960692-CA, Slip Op. at 1 (Utah App. June 25, 1998) (citations omitted). Deeming an issue waived or preserved based on whether it was either "implicitly" or "expressly" raised oversimplifies and misapprehends the doctrine of waiver.

The doctrine of waiver is intended to bar parties from arguing issues that were not presented for the trial court's consideration. See Oquirrh Assocs. v. First Nat'l Leasing Co., 888 P.2d 659 , 665 n.4 (Utah App. 1994) (holding that issue not argued before the trial court was not preserved for appeal). An issue will be considered on appeal if the record shows that the issue was presented to the trial court in a manner sufficient to obtain a ruling. Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah

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[1] Appellees could not claim possession of the disputed land by adverse possession because they had never paid taxes on it (R. 555).

App. 1989). Stated somewhat differently, "[a] matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue." State v. One 1979 Pontiac Trans Am, 771 P.2d 682, 684 (Utah App. 1989).

In determining whether an issue was "sufficiently raised," this Court has made clear that an appellant need not utter the precise terms used on appeal in order to preserve a particular claim for appellate review; an issue is preserved so long as its substance is conveyed to the trial court, and the trial court has an opportunity to consider the claim. See State v. Starnes, 841 P.2d 712, 716 (Utah App. 1992) ("While the words 'due process,' or the language of section 201(3)(c), were never expressly referred to by Starnes's counsel, an objection to hearing the case on the basis of proffer was made, considered by the trial court, and rejected. The issue [of due process under section 201(3)(c)] was therefore preserved for appeal.").

In this case, prior appellant counsel's use of the term "implicitly raised" should not be read so narrowly as to bar consideration of appellant's claim on appeal. A review of appellant's closing argument to the trial court demonstrates that one of her two primary strategies was limit the period of time that acquiescence by boundary could occur to only those years in which a non-family member owned property on one side of the alleged boundary. In attacking the second requirement of boundary by acquiescence — that landowners on both sides of an artificial boundary acquiesced to its treatment as a legal boundary — appellant consistently emphasized that the actions of the Pulley family indicated they considered the land one piece of property instead of two divided by the artificial boundary:

> Now for years, I guess, that land was owned by Pulleys on both

> sides of it, and it didn't seem to ever become an argument as to whether who owned what. But it certainly doesn't match up to those cases where — for example, in one case — this [acquiescence] was proven because the party on one side of the fence tried to buy the land on the other side of the fence, and so the Court decided, "Well, that's obviously acquiescing because they thought it was the other person's land so they tried to buy it."

R. 550-51.

Trial counsel's argument plainly challenged the notion that there could have been a boundary by acquiescence among family members where the actions of the family suggest the fence and tree line was not treated as a legal boundary. In other words, since there was never any dispute among members of the Pulley family about use or possession of the land on either side of the fence, the fence itself could not have been considered a boundary by acquiescence among family members.

The significance of appellant's claim that family members could not create a boundary by acquiescence is made clear a few paragraphs later in her argument. Still discussing the issue of whether there had been mutual acquiescence, counsel introduces the third requirement for establishing a boundary by acquiescence, namely that there be acquiescence for a period of at least twenty continuous years (R. 552). That point is made in conjunction with the fact that it was not until 1967 or 1968 that any of the disputed property was conveyed to someone outside the Pulley family:

> I guess what the Court has to decide, and what the defendant here is going to try and show is that previous owners prior to [appellant] had acquiesced in that line of the boundary.
>
> And again, I'll ask the Court to look at whether or not that occurred. The only real evidence on that was the Madsens [who bought the land in 1967] and the Boyers [who bought the land from the Madsens and sold it to appellant in 1979] — the Boyers couldn't even remember in telling [appellant] that there was a boundary discrepancy. They couldn't remember the meeting, in fact, in that — the disclosure meeting which

occurred.

> Between the two of them [the Madsens and the Boyers] they owned the land between 1968 and 1979, its only 11 years. I think importantly before 1968 there is no evidence — 1968 is when the Madsens moved in. Prior to that time the only evidence that's been provided is Ronald Pulley. And Ronald Pulley, by his own admission, did not live in that house since 1962 or so. There's no evidence here from Adolfus or any other prior owners.

R. 552-53.

Appellant's argument was an attempt to limit the time period that acquiescence could have occurred to the years after 1967 — the year that part of the Pulley property now owned by appellant was first conveyed to someone outside the Pulley family — and before 1979 when appellant acquired the property. Appellant sought to limit that time frame by attacking the very notion of a boundary by acquiescence among close family members.

In response to appellant's argument, appellee in fact countered that there had been a boundary by acquiescence based on the actions of landowners preceding appellant (R. 559-61). Significantly, in order to achieve the necessary period of twenty years, appellees had to rely on their claim that members of their own family had considered the fence/tree line a boundary (R. 559-60). Appellant knew that would be the case, and that is why appellant challenged the notion that a boundary by acquiescence could be created among family members who did not have a dispute over the boundary but had instead treated the land as "one piece of property" (R. 563).

In rebuttal, appellant returned to her theme of no acquiescence among family members who treated the land as one piece of property:

> Secondly, during that period of time prior to — I guess it was the Madsens or the Boyers — the testimony was that Mary [Pulley] mowed

> and watered both sides [of the fence/tree line] or both lawns, and then it wasn't until some time later that she disconnected [the water pipes to the other side of the fence] and we don't now when. She disconnected the water pipes, and the land the Stokes' property now became somewhat yellow and dry, because it wasn't being watered or taken care of.
>
> But previous to that time she did both sides, she took care of it and mowed it and she watered both sides. It tends to indicate that really, since it was close family on both sides, that it was treated as one piece of property. There wasn't a boundary where they needed to dispute over or get right or get corrected, make sure it's where it was supposed to be. It was treated as one property by sister and brother.

R. 563.

Appellant's argument at trial was focused on a distinct theme aimed at undermining the appellees' claim that owners prior to appellant had considered the fence/tree line a boundary. Appellant's primary claim was that where members of the same family own the land on both sides of an alleged artificial boundary no boundary by acquiescence can occur where the family acts as though the land is one piece of property.

To finally drive her point home, in her concluding argument appellant again emphasized that it was not until after someone outside the Pulley family obtained part of the land that boundary by acquiescence could be established:

> The first time [any part of the land] became someone else's property was with the Madsens, and that was in 1968, I believe is what they testified — 1967 or 1968, and at that time is when you go back to the boundary of acquiescence [f]or a long period of time. Prior to that it was treated [as one piece of property] by brother and sister, she mowed them both and cared for both [sides of the fence], since that time it was separate.

R. 563.

In sum, although appellant did not utter the precise words "presumption against boundary by acquiescence among family members," she advanced that argument in

substance. In ruling that a boundary by acquiescence had been created during a period including years that members of the Pulley family owned the land on both sides of the alleged boundary, the trial court necessarily rejected appellant's argument. Appellant's claim was therefore preserved for appellate review. See Starnes, 841 P.2d at 716 (though the precise terms advanced on appeal were not used at trial, substance of claim was raised and rejected by trial court and issue was therefore preserved).

CONCLUSION

Had the trial court accepted appellant's argument that there could be no boundary by acquiescence among members of the Pulley family, appellees would not have been able to establish acquiescence for the requisite period of twenty years. Given the presumption in favor of adhering to the legal descriptions of property boundaries, appellant would have prevailed at trial and on appeal. This Court should therefore grant appellant's petition for rehearing and address the merits of whether there was evidence to overcome a presumption against boundary by acquiescence among family members.

RESPECTFULLY SUBMITTED this 20th day of July, 1998.

ISHOLA, UTZINGER & PERRETTA
Attorneys for Appellant

TODD UTZINGER

CERTIFICATE OF GOOD FAITH FILING

As required under rule 35(a), Utah Rules of Appellate Procedure, counsel hereby certifies that this petition is presented in good faith and not for delay.

ISHOLA, UTZINGER & PERRETTA
Attorneys for Appellant

TODD UTZINGER

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Petition for Rehearing was mailed, postage prepaid, to:

T. McKAY STIRLAND
DONALD E. MCCANDLESS
Fisher, Scribner & Stirland
2696 N. University Avenue, Suite 220
Provo, Utah 84604

this 20th day of July, 1998.

TODD UTZINGER

ADDENDUM A

IN THE UTAH COURT OF APPEALS

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Christina R. Stokes, Plaintiff and Appellant, v. Mary J. Pulley, Wendell Hansen, Camille Fowler, Jim Fowler, Travis Hansen, Troy Hansen, and Regan Hansen, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 960692-CA F I L E D (June 25, 1998)

Fourth District, Provo Department
The Honorable Ray Harding, Sr.

Attorneys: Helen H. Anderson, Provo, for Appellant
T. McKay Stirland and Donald E. McCandless, Provo, for Appellees

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Before Judges Davis, Greenwood, and Orme.

ORME, Judge:

Appellant concedes she only "implicitly" preserved the issue of whether family relationships create a presumption of nonacquiescence in an artificial boundary. However, "an issue must be expressly preserved below to warrant appellate consideration." State v. Pugmire, 898 P.2d 271, 273 n.4 (Utah Ct. App.) (emphasis in original), cert. denied, 910 P.2d 425 (Utah 1995). Thus, because appellant failed to expressly raise this issue below, we do not reach it.

Although appellant also failed to object to the trial court's finding of mutual acquiescence, she is free to raise this issue for the first time on appeal. See Utah R. Civ. P. 52(b). Nonetheless, this finding was amply supported by, inter alia, testimony from 97-year-old John Pulley, a firsthand witness to the boundary acquiescence, who testified in no uncertain terms that the acquiescence occurred. Thus, we cannot say the trial court clearly erred in finding mutual acquiescence in the boundary.

Similarly, we see no clear error in the trial court's finding that the properties were adjoining. The existence of a gap in recorded legal descriptions, while no doubt problematic in other real property contexts and in regard to the rights of third parties, is wholly inconsequential in an action to determine an acquiesced-in boundary between neighboring landowners--especially given the trial court's finding that the properties were contiguous as a matter of fact.

For the foregoing reasons, we affirm the trial court's judgment. However, we decline to grant appellee's request for attorney fees on appeal. Appellant's arguments on appeal, especially her issue as to what constitutes "adjacent" properties, are sufficiently meritorious that, although unavailing, they cannot be regarded as frivolous.

Gregory K. Orme, Judge

WE CONCUR:

James Z. Davis,
Presiding Judge

Pamela T. Greenwood, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of June, 1998, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:

Helen H. Anderson
Howard, Lewis & Petersen
120 E 300 N St
Provo UT 84601

T. McKay Stirland
Donald E. McCandless
Fisher, Scribner & Stirland
2696 N University Ave #220
Provo UT 84604

and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the judge listed below:

Honorable Ray Harding, Sr.
Fourth District Court
PO Box 1847
Provo UT 84601

Hollie Hayes
Judicial Secretary

TRIAL COURT: Fourth District, Provo Dept., #940400337
APPEALS CASE NO.: 960692-CA